No. 04-364

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In The
Supreme Court of the United States

PRE-PAID LEGAL SERVICES, INC., et al.,
Petitioners,
v.
LAURA BRADLEY, et al.,
Respondents.

PRE-PAID LEGAL SERVICES, INC., et al.,
Petitioners,
v.
JOAN BROWNLOW, et al.,
Respondents.

PRE-PAID LEGAL SERVICES, INC., et al.,
Petitioners,
v.
CLARA MEALEY, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Mississippi Supreme Court's ruling that the parties did not agree to arbitrate the claims asserted by Respondents below violates the Federal Arbitration Act by impermissibly discriminating against a purported arbitration clause.

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OPINION BELOW

Petitioners erroneously state that the opinions of the Mississippi Supreme Court to which they seek certiorari had not been released for publication in an official reporter at the time the Petition was filed. The *Bradley* opinion is reported at 874 So.2d 984 (Miss. 2004); the *Brownlow* opinion at 874 So.2d 972 (Miss. 2004); and the *Mealey* opinion at 875 So.2d 1075 (Miss. 2004).

JURISDICTION

The issues presented to and resolved by the Mississippi Supreme Court do not create a conflict between the Mississippi Supreme Court and another state court or a United States court of appeals within the meaning of Sup. Ct. Rule 10(b). Additionally, the Mississippi Supreme Court has not decided an important question of federal law or a federal question within the meaning of Sup. Ct. Rule 10(c). Instead the Petition seeks review of the Mississippi Supreme Court's determination of an issue of state law that conflicts with no identified federal decision.

STATEMENT OF THE CASE

Respondents adopt the procedural history of this matter as set forth in the Petition. Respondents do not adopt any argument contained in the Statement of the Case.

REASONS FOR DENYING THE PETITION

A. The Mississippi Supreme Court's Ruling That Respondents Did Not Agree to Arbitrate Their Claims Against Petitioner Does Not Discriminate Against the Federal Arbitration Act.

In its decision below, the Mississippi Supreme Court found that there was not an agreement to arbitrate the claims Respondents have brought against Petitioners in Mississippi state court. Petitioners seek certiorari on grounds that the Mississippi Supreme Court's ruling violates the Federal Arbitration Act ("FAA"). Petitioners base this contention on arguments that the Mississippi Supreme Court has imposed "unique" requirements on arbitration clauses that serve to erect discriminatory barriers to their enforcement. *Petition*, p. 7.

In their request for certiorari, Petitioners set forth a disagreement with the Mississippi Supreme Court's ruling below. Petitioners do not, however, provide this Court with any evidence of discrimination against arbitration. Because Petitioners have not and cannot provide this Court with any evidence to support the contention that the Mississippi Supreme Court has done anything other than apply standard contract interpretation principles to the arbitration issue presented in this case, the request for the writ should be denied.

1. Petitioners have not provided the Court with evidence of discrimination against the FAA.

Petitioners allege that the Mississippi Supreme Court's decision below reflects "continued animosity toward arbitration clauses." *Petition*, p. 7. Petitioners

further allege that the Mississippi Supreme Court imposed a "notice requirement" and a "signature requirement" on arbitration clauses, and that it "refused to apply rules which apply to the construction of contracts generally" in violation of this Court's decisions in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

The Petition is devoid of any evidence to support these naked assertions. Unlike the state court decisions overturned in *Keating* and *Casarotto*, the Mississippi Supreme Court's decision below does not interpret a state statute as precluding arbitration. Instead the court found that the parties did not enter into an agreement to arbitrate. Petitioners do not dispute that the Mississippi Supreme Court was empowered to make a finding of whether the parties have entered into an agreement to arbitrate pursuant to Mississippi law. *See Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004) (holding that the question of "whether there is a valid agreement to arbitrate between the parties" is "decided according to state law"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Petitioners base their allegation that the Mississippi Supreme Court has impermissibly discriminated against the FAA in part on the argument that the court imposed a "notice requirement" and a "signature requirement" on arbitration clauses. *Petition*, pp. 8, 10. A review of the court's opinion, however, provides no support for this contention. In fact the only reference to "notice" in the opinion is a block quotation of the Northern District Court of Mississippi's opinion in *McCreary v. Liberty Nat'l Life*, 6 F.Supp.2d 920, 920-21 (N.D. Miss. 1998).

In *McCreary*, the federal district court found "[t]here was no notice, no discussion, and no negotiation of the arbitration endorsement, circumstances, which, in this court's view, hardly signify either agreement or waiver." *Id.* The Mississippi Supreme Court then concluded that, as in *McCreary*, the absence of notice was a factor supporting its conclusion that the parties did not enter into an arbitration agreement. *Pre-Paid Legal Services, Inc. v. Battle*, 873 So.2d 79, 84 (Miss. 2004). The court did not hold that notice was a prerequisite to the enforcement of an arbitration clause; it simply concluded that the absence of notice supported its determination that the parties never entered into an arbitration agreement.

Similarly, the court specifically based its finding that the absence of a signed arbitration clause supported its conclusion that the parties did not enter into an arbitration agreement in the *McCreary* decision. *Battle*, 873 So.2d at 83 ("As in *McCreary*, the plaintiffs in the case *sub judice* signed only the application, which did not contain an arbitration provision.") The court did not hold that a signature was required in order for an arbitration agreement to be enforceable; instead, it concluded that the absence of a signed arbitration agreement – together with the absence of notice or discussion and the broad, general language on which Petitioners rely – supported its determination that the parties never entered into an arbitration agreement.

The determination of whether there has been the requisite "meeting of the minds" for the formation of a legal agreement is one that state courts have long made. The Mississippi Supreme Court's determination below was based on an examination of the circumstances surrounding the purported agreement and the conduct of the

parties. Although Petitioners cavalierly represent that the Mississippi Supreme Court's opinion below discriminates against arbitration agreements in violation of the FAA, they provide absolutely no evidence in support of this representation. The Petition is devoid of any precedent from the Mississippi Supreme Court in which the legal principles of notice and negotiation are applied inconsistently with its holding in *Battle* below.

Moreover, the Petition fails to provide this Court with any precedent in which the Mississippi Supreme Court's consideration of whether parties had entered into an agreement was undertaken in a manner different from that below. The *Battle* opinion does not depart from the Mississippi courts' determination of whether there has been a "meeting of the minds" sufficient to recognize a legal agreement. *See In re Estate of Davis*, 832 So.2d 534, 536 (Miss. Ct. App. 2001) ("Consideration and a *meeting of the minds* between competent contracting parties are the essential elements of a valid, binding agreement.") As in the *Turney* opinion ironically cited by Petitioners, the Court considered the issue of a signature *vel non* as a factor in its consideration of whether the parties entered into an agreement – not as itself determining the existence of an agreement. *Turney v. Marion County Bd. of Educ.*, 481 So.2d 770, 774 (Miss. 1985) ("The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, as, for example, by the acts or conduct of the parties."); *Battle*, 873 So.2d at 84 ("Just as in *McCreary*, here there was no notice, no discussion, and no negotiation of the arbitration agreement.") Thus the *Battle* court's examination of the circumstances surrounding the purported agreement is wholly consistent with the *Turney* opinion.

Finally, perhaps the best evidence that the Mississippi Supreme Court has not discriminated against the FAA is the court's reliance upon the *McCreary* decision. The *Battle* opinion below explicitly relies upon the federal district court's reasoning in *McCreary*. The Petition completely ignores the fact that the Mississippi Supreme Court found support for its decision in a federal court decision – *McCreary* is not even cited in the Petition. Contrary to Petitioners' allegation that the court has shown "animosity" toward the FAA, the opinion below is grounded firmly in reasoning adopted from a federal opinion. The notion that the Mississippi Supreme Court's reliance on a federal decision can be characterized as discrimination against a federal statute is both groundless and nonsensical.

2. Petitioners cannot establish discrimination based on the absence of precedent addressing the specific facts below.

The Fifth Circuit Court of Appeals recently rejected the "arbitration discrimination" argument advanced by Petitioners. In *Banc One Acceptance Corp. v. Hill*, the Fifth Circuit reviewed the district court's denial of Banc One's motion to compel arbitration pursuant to Mississippi law of unconscionability as it was recently articulated by the Mississippi Supreme Court in *East Ford, Inc. v. Taylor*, 826 So.2d 709, 717 (Miss. 2002). *Hill*, 367 F.3d 426 (5th Cir. 2004). On appeal Banc One, relying on *Casarotto* as Petitioners do herein, argued that *Taylor* impermissibly discriminates against arbitration agreements. *Hill*, 367 F.3d at 432.

In an opinion by Judge Jones, the Fifth Circuit rejected Banc One's argument that the *Taylor* decision

discriminated against arbitration agreements because it "set out its particular approach to unconscionability in the context of an arbitration dispute". *Id.* The court held that were it to accept Banc One's argument, "a state court would find it extremely difficult to craft a decision holding an arbitration provision unconscionable under state law because, by setting out a particular approach to unconscionability in the context of an arbitration case, the state court would be impermissibly discriminating against arbitration under the FAA." *Id.*

Petitioners urge the Court to find discrimination based on the same argument rejected in *Hill*. The petition does nothing more than argue that in the absence of precedent outside the arbitration context in which the Mississippi Supreme Court reached the same decision as below, this Court should infer discrimination against the FAA. *Hill* refused to infer discrimination based on the absence of such precedent:

> It is important to note here that if the Mississippi courts were to limit the applicability of the procedural unconscionability approach outlined in *Taylor* to arbitration agreements only, or were repeatedly to apply a different approach to other contractual provisions, the issue of discrimination against arbitration under the FAA may come into play. However, absent any compelling evidence of such an approach, and given that *Taylor* was decided relatively recently, we decline to find improper discrimination here.

Hill, 367 F.3d at 432, n. 3. The Court should similarly decline to impute a discriminatory motive or find a discriminatory effect simply because the Mississippi courts

have not yet had occasion to address the factual scenario below outside the arbitration context.

3. The Mississippi Supreme Court's finding that the purported arbitration provision is contradicted by other language in the purported agreement provides an alternative basis for the court's decision.

In finding that the parties did not agree to arbitration, the court noted an additional basis for affirming the trial court's summary judgment in favor of Plaintiffs/Respondents:

> [T]he purported arbitration provision is contradicted because the contract also contemplates a lawsuit being filed by either National or the plaintiffs. Both contracts contain the following provision:
>
> * * *
>
> 2. Any person or entity who initiates or participates in a lawsuit against the Company or any of its affiliates, or is named as a defendant or respondent in a lawsuit initiated by the Company or any of its affiliates, shall be specifically excluded from receiving coverage under this Contract for services related to such lawsuit. . . .

Battle, 873 So.2d at 84. Because of the ambiguity caused by the agreement's purported arbitration provision and its contemplation of a lawsuit being filed by National Pre-Paid or the plaintiffs, the court concluded that the parties had not entered into a valid, binding arbitration agreement. This determination by the Mississippi Supreme

Court is consistent with other courts' analyses of such ambiguities. *See Heye v. American Golf Corp., Inc.*, 80 P.3d 495, 500 (N.M. Ct. App. 2003) ("We conclude that the conflicting terms of the arbitration agreement render it ambiguous."); *Owner-Operator Indep. Drivers Assoc. v. C. R. England, Inc.*, 325 F.Supp.2d 1252, 1259 (D. Utah 2004) (limiting scope of arbitration clause that was contradicted by provisions allowing for resolution of many disputes outside of arbitration).

CONCLUSION

Petitioners fail to provide any support for their contention that the Mississippi Supreme Court has discriminated against the Federal Arbitration Act. The Petition offers nothing more than a disagreement with the court's determination that the parties failed to enter into an agreement to arbitrate the claims brought by Respondents. Petitioners effectively seek to reargue the appeal decided against them in state court on a question of state law, without evidence of a conflict between the Mississippi Supreme Court and the Circuit Courts, or of a conflict between the Mississippi Supreme Court and any federal statute. Because they offer no evidence in support of their contention that the Mississippi Supreme Court's decision is inconsistent with its consideration of contract formation questions generally, Petitioners fail to establish discrimination.

FOR THESE REASONS, the Petition should be denied.

Respectfully submitted,

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